

October 17, 2014

EDWARD J. EMMONS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



Signed and Filed: October 17, 2014

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case
HOWREY LLP,) No. 11-31376DM
Debtor.) Chapter 11

MEMORANDUM DECISION REGARDING (1) FINAL FEE APPLICATION OF
McGRANE LLP AND (2) MOTION TO DISQUALIFY McGRANE LLP
AND WILLIAM McGRANE

I. INTRODUCTION

On July 29, 2014, this court held a hearing on and took under submission the Fourth and Final Application for Compensation ("Final App") by McGrane LLP ("MLLP") and its principal, William McGrane ("Mr. McGrane") for services rendered while acting as co-counsel for the Official Committee of Unsecured Creditors (the "Committee"). Although the Final App contains inconsistent information about the fees and costs sought by MLLP, the Master Summary on page 7 seeks final approval of fees in the amount of \$78,680 and costs in the amount of \$877.05.¹ According to Part

¹By the court's calculations, MLLP has incurred fees and costs in the amount of \$79,907.05, which consists of (1) \$26,780 in fees allowed by an order entered on May 17, 2012; (2) \$33,400 in fees and \$62.25 in fees allowed by an order entered on September 26, 2012; and (3) an additional \$18,850.00 in fees and

1 VII(B) of the Final App, MLLP has received a \$63,925.64 payment,
2 and seeks an additional compensation in the amount of \$15,631.41.

3 After MLLP filed a third and final application (which has now
4 been incorporated into the Final App) in October 2012, it
5 commenced its representation of an entity that had acquired claims
6 from certain creditors in an effort to recover estate assets via a
7 class action. As a result, Allan Diamond, the chapter 11 trustee
8 ("Trustee"), opposed the third application and filed a motion
9 against MLLP and Mr. McGrane for enforcement of the automatic
10 stay. The Committee joined Trustee's motion for enforcement of
11 the stay and filed a motion to disqualify Mr. McGrane and MLLP.
12 Following several hearings and further filings, the parties
13 stipulated to an interim payment to MLLP, reserving all objections
14 to any fees requested in MLLP's final application, which was to be
15 filed no later than December 21, 2014. The court approved the
16 stipulation by an order entered on November 26, 2013, and directed
17 that Trustee pay MLLP \$63,925.64 within five business days. MLLP
18 filed the underlying Final App on May 30, 2014.

19 Both Trustee and the Committee opposed the Final App,
20 contending that MLLP should not be compensated at all for its
21 services while it was employed by the Committee. The opponents
22 argued (among other things) that MLLP has acted adversely to its
23 former client, the Committee, in derogation of the California
24 Rules of Professional Responsibility. The court agrees and is
25 therefore disallowing all fees sought by MLLP in its "Litigation"
26 category, including the fees that were previously allowed on an

27 _____
28 \$814.80 sought in the Final App.

1 interim basis. These disallowed fees total \$46,325.00. The court
2 will therefore allow \$32,355 in fees (\$78,680 - \$46,325) and
3 \$877.05 in expenses. MLLP will have to disgorge to Trustee any
4 amounts paid to it in excess of \$33,232.05 (the total of the
5 allowed fees and costs). By the court's calculations, MLLP will
6 have to disgorge \$30,693.59 to Trustee.

7 Even if MLLP had not acted adversely to the interests of its
8 former client, the court would reduce the fees significantly
9 because (1) the work performed by MLLP exceeded the scope of its
10 employment as set forth in its employment application and
11 subsequent response to Trustee's opposition, (2) certain work
12 performed either provided no benefit to the estate or was
13 unnecessarily duplicative of work performed by other estate
14 professionals, and (3) MLLP's first interim application for
15 compensation reflects that it was billing the estate for work it
16 performed on behalf of its purportedly former client (Matura
17 Farrington Staffing Services, Inc. ("Matura")) and for resolving
18 disputes with Mr. McGrane's former law firm. And as the court
19 mentioned at the hearing on MLLP's first interim application, the
20 hourly rate (\$800) charged by Mr. McGrane seemed high,
21 particularly when he was billing in increments of .25 hours.²

22
23 ²The blended hourly rate billed by MLLP during its
24 representation of the Committee was \$562.95. In contrast, the
25 August 2014 fee application the Committee's primary counsel
26 reflected a blended hourly rate of \$402.69 (fees of \$222,322
27 divided by 480.5 hours billed in that time period). The average
28 billing rate of the Trustee's firm is even lower: \$315.35. The
individual attorneys performing most of the work at the Trustee's
firm bill less than \$500 an hour. Mr. Loden bills \$465/hour; Mr.
Rudd bills \$440/hour; Mr. Ryan bills \$350/hour; Mr. Sheppard and
Ms. Welch bill \$260/hour; Mr. Fishel bills \$225/hour; and Ms.
Burrow bills \$190.00/hour.

1 While Mr. McGrane (but not his associate, Mr. Walreith) adjusted
2 his billing increments to .1 hour (as required by this court's
3 compensation guidelines) in subsequent applications, the \$800 rate
4 was excessive for some of the tasks performed (preparation of fee
5 applications, etc.). In light of the disallowance and
6 disgorgement due to ethical conflicts (discussed below), the court
7 will not make further downward adjustments based on these
8 additional concerns.

9 In light of representations of Mr. McGrane and MLLP through
10 counsel that they "have no intention of ever again appearing in
11 this Howrey bankruptcy case," the court will deny as moot the
12 motion to disqualify (subject to conditions described in Part
13 III(B) below).

14 II. RELEVANT FACTS³

15 On April 11, 2011, creditors Give Something Back Inc., Jan
16 Brown & Associates, and Matura commenced a chapter 7 involuntary
17 case against Howrey LLP ("Howrey" or "Debtor"). Mr. McGrane, on
18 behalf of his former firm, Trepel McGrane Greenfield LLP
19 ("Trepel"), was the attorney of record for the petitioners.
20 Thereafter, Mr. McGrane filed notices that Western Messenger
21 Service, Inc., L.A. Best Photocopies, Inc., Kent Daniels and
22 Associates, Inc., and Advanced Discovery LLC were joining in the
23 involuntary chapter 7 petition.

24 On June 6, 2011, Debtor conditionally consented to entry of
25

26
27
28 ³The following discussion constitutes the court's findings of
fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

1 an order for relief and moved for conversion of the case to
2 chapter 11. On the same day, the court entered an order for
3 relief and converted the case to chapter 11, and Debtor acted as a
4 debtor-in-possession until September 15, 2011, when the court
5 granted the motion of Citibank N.A. to appoint a chapter 11
6 trustee.

7 The United States Trustee appointed the Committee on June 14,
8 2011,⁴ and Matura was appointed as a member. Mr. McGrane and
9 Trepel represented Matura in its capacity as a member of the
10 Committee until August 3, 2011, when MLLP replaced Trepel. He and
11 MLLP continued to represent Matura until December 16, 2011.

12 On October 20, 2011, the Court entered an order authorizing
13 the employment of Bradford F. Englander and Whiteford Taylor
14 Preston LLP (collectively, "WTP") as counsel for the Committee.
15 On December 19, three days after Matura filed a substitution of
16 counsel terminating MLLP's representation, the Committee filed an
17 application to employ MLLP as co-counsel to WTP. In his
18 declaration in support of the employment application, Mr. McGrane
19 stated that he would "represent only the Committee, and not any of
20 its respective individual members, in connection with the case."
21 He also acknowledged in paragraph 13 that all of his court-
22 approved compensation expenses would "be paid by the Bankruptcy
23 Estate."

24 The Trustee filed a response to the employment application,

25
26 ⁴The court authorized the employment of Felderstein
27 Fitzgerald Willoughby & Pascuzzi LLP as counsel for the Committee
28 on July 15, 2011. On October 3, 2011, Felderstein moved to
withdraw as counsel for the Committee and indicated that if the
court desired further information about the withdrawal, it would
provide it. The court did not request further information.

1 in which he contended that the Committee failed to justify
2 employment of additional counsel and that the scope of work to be
3 performed by MLLP was "virtually identical" to the work approved
4 in the WTP application. Trustee was concerned that employment of
5 MLLP would "result in additional administrative costs from two law
6 firms with overlapping and duplicative responsibilities
7 representing the Committee." Trustee therefore requested that the
8 Committee "(i) demonstrate the cause and necessity to support its
9 unusual request to employ additional counsel; and (ii) [] clarify
10 the specific roles and responsibilities for each of its counsel to
11 ensure the cost effective representation of the Committee."

12 As reflected in his time entries appended to his first
13 interim fee application, Mr. McGrane drafted a reply to the
14 Trustee's response. That reply, filed by Mr. Englander, stated
15 that the engagement of MLLP was appropriate to address connections
16 that WTP had with certain parties in the case, such as Wiley Rein
17 (Debtor's chapter 11 counsel) and Protiviti (another professional
18 retained by the chapter 11 estate). "While these connections do
19 not rise to the level of formal conflicts, having McGrane take the
20 lead on behalf of the Committee with respect to ongoing fee
21 disputes in connection with Protiviti and Wiley Rein would be
22 prudent."⁵ In addition, the reply noted that "*both [MLLP] and*
23 *[WTP] have agreed to avoid unnecessary duplication of services,*
24 *with the much larger [WTP] firm to take the lead in most matters,*

25
26 ⁵ The court has examined the narratives of the fee
27 applications filed by MLLP covering the time period of December
28 15, 2011, through September 26, 2012. These fee applications do
not describe any work performed by MLLP with respect to Protiviti
or Wiley Rein.

1 and with the [MLLP] firm to take the lead in matters only as, when
2 and if it is specifically asked to do so by the Committee or
3 [WTP]." (Emphasis added). The reply acknowledges that "any
4 violation of these undertakings by way of any sort of improper
5 billing practices by either firm can, of course, [and] should be
6 objected to by any interested party in any case." In light of
7 this reply, Trustee did not further oppose the employment
8 application and the court entered an order authorizing the
9 employment of MLLP as co-counsel to the Committee on January 6,
10 2012.

11 MLLP filed its first interim fee application on April 17,
12 2012, seeking fees in the amount of \$27,815.00 for, *inter alia*,
13 investigating potential chapter 5 and section 723 causes of action
14 and for consulting with Trustee about these causes of action.
15 Moreover, it included entries in late March 2012 for "draft[ing]
16 demand letter from K. Farrington to C. Sullivan" and for "E-mail
17 correspondence with K. Farrington, W. Russell, C. Sullivan and B.
18 Greenfield re transfer of Trepel Greenfield files, review[ing]
19 demand letter from K. Farrington to C. Sullivan." Ms. Farrington
20 is the principal of Matura, who was no longer represented by MLLP.
21 At best, MLLP was billing the estate for a specific task performed
22 on behalf of a former client; at worst, it was concurrently
23 representing the interests of Ms. Farrington and Matura as well as
24 those of the Committee without making the appropriate Rule 2014
25 disclosures.

26 On July 31, 2012, MLLP filed its second interim fee
27 application, seeking fees and costs in the amount of \$33,462.25.
28 The second fee application indicates that Mr. McGrane, while

1 employed by the Committee, explored and researched theories of
2 liability against Debtor's former partners under both California
3 law and section 723 of the Bankruptcy Code, drafted a complaint
4 asserting that the former partners of the Debtor have personal
5 liability for the Debtor's debts, and evaluated claims under
6 chapter 5 of the Bankruptcy Code. According to Trustee's
7 objection to MLLP's final fee application, Trustee's counsel
8 independently researched these claims (expending about 16 hours of
9 time), found them insupportable and informed Mr. McGrane of their
10 findings in May 2012. Nevertheless, Mr. McGrane continued to
11 incur fees (more than \$25,000) to research and develop these
12 claims. In that vein, at the hearing on the second interim fee
13 application on August 22, 2012, Mr. McGrane informed the court
14 that the Committee was investigating whether the Debtor's possible
15 failure to properly register with the California State Bar
16 stripped the Debtor's former partners of their protection from
17 personal liability for the firm's debts.

18 On September 20, 2012, MLLP sought permission to withdraw
19 from its representation of the Committee. The Committee approved
20 the request and five days later, the court signed an order
21 authorizing the substitution of Mr. Englander and WTP as sole
22 counsel for the Committee.

23 On October 19, 2012, MLLP filed a third and final fee
24 application (subsequently replaced by the Final App) seeking final
25 approval of \$78,680 in fees and \$877.05 in costs. Eleven days
26 later, Howrey Claims LLC ("Howrey Claims") was formed, and on
27 October 31, 2012, Howrey Claims purchased a claim from Jan Brown &
28 Associates, a petitioning creditor formerly represented by Mr.

1 McGrane and Trepel, in the amount of \$994.25.

2 Approximately one month after withdrawing from Committee
3 representation, MLLP filed a complaint in this court (A.P. No. 12-
4 3155) on behalf of Howrey Claims, asserting a class action alter
5 ego suit against former Howrey partners (the "Alter Ego AP"). On
6 November 9, 2012, Mr. McGrane filed a supplemental Rule 2014
7 declaration describing the circumstances surrounding his
8 engagement on behalf of Howrey Claims and attaching excerpts of e-
9 mails in which he unsuccessfully sought the Committee's
10 acknowledgment that he could represent Howrey Claims in the Alter
11 Ego AP.

12 On November 15, 2012, Trustee filed a motion for enforcement
13 of the automatic stay seeking the entry of an order (1) declaring
14 that the Alter Ego AP violated the automatic stay, and (2)
15 declaring that Howrey Claims and its counsel would be held in
16 contempt of court if they did not dismiss the Alter Ego AP and
17 refrain from taking any further action to pursue recoveries from
18 the former partners of the Debtor as the Debtor's alleged alter
19 egos.

20 On December 7, 2012, the Committee filed a motion to file
21 under seal a motion to disqualify Mr. McGrane and MLLP. Mr.
22 McGrane filed an opposition to the motion to seal and a supporting
23 declaration in which he publicly disclosed confidential
24 information concerning the Committee's deliberations and strategy,
25 including an internal memorandum and a term sheet regarding a
26 proposed chapter 11 plan. (See Docket No. 910). The court granted
27 the motion to seal the motion to disqualify, which the Committee
28 filed on December 16, 2012.

1 Following a hearing on January 11, 2013, the court entered
2 (on January 18, 2013) an order granting the Trustee's motion for
3 enforcement of the automatic stay, holding that the claims
4 asserted in the Alter Ego AP belonged to the Trustee and the
5 estate. The court also sua sponte dismissed the Alter Ego AP
6 without leave to amend. Howrey Claims filed two notices of appeal:
7 one of the order enforcing the automatic stay and another of the
8 order dismissing the Alter Ego AP.

9 On March 13, 2013, Howrey Claims, represented by other
10 counsel, filed a motion to modify the automatic stay to permit it
11 to file an alter ego class action against Debtor's former partners
12 in the United States District Court for the Northern District of
13 California (the "Alter Ego Motion"). On March 14, 2013, Mr.
14 McGrane joined the Alter Ego Motion as an interested party.
15 Trustee (later joined by the Committee and Citibank, N.A., the
16 primary secured creditor) opposed the Alter Ego Motion. On March
17 25, 2013, Mr. McGrane, acting individually as an interested party,
18 filed a reply brief in support of the Alter Ego Motion, which was
19 joined by the purported movant (Howrey Claims). The Alter Ego
20 Motion was amended on March 26, 2013, and again opposed by
21 Trustee. On April 1, 2013, Mr. McGrane (again acting as an
22 interested party) opposed the Committee's joinder to the Trustee's
23 opposition.

24 At a hearing on April 5, 2013, the court denied the amended
25 Alter Ego Motion and entered an order accordingly on April 7.
26 Howrey Claims, this time represented by MLLP, filed a third notice
27 of appeal. The district court consolidated all three appeals
28 under Case No. C 13-0449 SBA, and on August 8, 2014, issued an

1 order affirming all three orders.

2 On May 5, 2014, the Trustee and the Committee filed a joint
3 motion to approve a settlement with 61 former Howrey partners
4 represented by Klee, Tuchin, Bogdanoff & Stern LLP (the "KTBS
5 Settlement"). On May 10, 2014, acting on behalf of Advanced
6 Discovery, LLC, Give Something Back, Inc., Howrey Claims, Kent
7 Daniels and Assoc., Inc., L.A. Best Photocopies, Inc., Matura, and
8 Western Messenger, Inc. (collectively, the "Advanced Creditors"),
9 MLLP objected to the KTBS Settlement, contending (among other
10 things) that alter ego claims are not property of the estate but
11 rather constitute "a non-exclusive remedy available to anyone
12 owning, *inter alia*, a substantive claim against a corporation,
13 specifically including, but not limited to the Advanced
14 Creditors."

15 In response to the Advanced Creditors' opposition, Mr.
16 Englander filed a reply that highlighted the Committee's role in
17 procuring the settlement and demonstrating how Mr. McGrane was
18 acting contrary to the interests of his former clients in a matter
19 directly related to his prior representation (i.e., maximizing
20 recovery for the unsecured creditor body). As noted by Mr.
21 Englander:

22 [The] Committee actively participated throughout the
23 nearly two-year negotiation with the KTBS Howrey
24 Partners, and has analyzed the claims, defenses, and
25 other material aspects of the Debtor's claims against
26 them. The chair of the Committee, along with Committee
27 counsel, attended the two-day mediation held between the
28 Trustee, the Committee, and the KTBS Howrey Partners.
That mediation was conducted with the assistance of
retired bankruptcy judge Hon. Arthur J. Gonzalez. *The
Committee not only supports [the KTBS Settlement]; it is
a party to the settlement.* The Committee believes that
the settlement is in the best interest of unsecured
creditors.

1 Emphasis added. Notwithstanding the Committee's endorsement of
2 and participation in the settlement, its former counsel (MLLP)
3 opposed the settlement to the extent that it compromised alter ego
4 claims asserted by Advanced Creditors. The Committee observed
5 that these "new" alter ego claims were similar to Mr. McGrane's
6 admitted "ill-conceived" theories that he researched and advocated
7 while acting as Committee counsel:

8 Mr. McGrane's "creativity" does not override the
9 Trustee's business judgment, or legitimize Mr. McGrane's
10 continued interference in the administration of the
11 Howrey estate. *This is especially true where the*
12 *Committee, which is the official representative of the*
13 *unsecured creditors, and Mr. McGrane's former client,*
14 *has determined that the settlement is in the best*
15 *interests of the unsecured creditors.* Both the Trustee
16 and the Committee have evaluated the various theories
17 that Mr. McGrane from time-to-time has raised. The
18 Trustee and the Committee also have considered the
19 merits of the more conventional causes of action that
20 could be asserted against the former Howrey partners
21 represented by KTBS. Mr. McGrane and his token group of
22 objecting creditors may not supplant the business
23 judgment of the Trustee and the Committee with their
24 own.

25 Emphasis added.

26 After extensive briefing and multiple hearings, the court
27 overruled the objections of the Advanced Creditors to the KTBS
28 Settlement, approved the settlement (except as to certain
injunctive relief described in paragraph 1(c) of the settlement
agreements), and denied Mr. McGrane's oral motion for a stay
pending appeal. On June 27, 2014, the court entered an order
approving the KTBS Settlement, and the Advanced Creditors
(represented by MLLP and co-counsel) filed a notice of appeal on
June 30, 2014 (Civil Case No. 14-03062 JD).

The Advanced Creditors moved the district court for a stay

1 pending appeal, which was denied by an order entered on July 14,
2 2014. On page 2 of the motion for stay pending appeal, Advanced
3 Creditors identified the harm inflicted by former partners for
4 which the Advanced Creditors were seeking redress: a taking by
5 former partners of "tens of millions of dollars in draws from
6 their now-bankrupt law firm despite their having actual knowledge
7 that their taking such large draws would substantially interfere
8 with Howrey LLP's ability to ever ultimately pay its trade
9 creditors." In the district court's July 14 order denying the
10 stay pending appeal, it held that Trustee's claims against former
11 partners, "which he is pursuing for the benefit of all of Howrey's
12 LLP's creditors, substantially overlap with appellants' alter ego
13 claim." Mr. McGrane filed a stipulation to dismiss this appeal
14 on August 11, 2014.

15 In the meantime, MLLP filed on behalf of the Advanced
16 Creditors a motion to disqualify Diamond McCarthy LLP from
17 representing the Trustee and to remove the Trustee.⁶ Mr. McGrane
18 contended that following his departure, the court's docket
19 reflected that his former law firm (Trepel) remained as counsel of
20 record to three of the petitioning creditors. He therefore argued
21 that Diamond McCarthy should be disqualified because several of
22 his former partners and associates at Trepel joined Diamond
23 McCarthy in May 2014. Following a hearing, this court denied the

24
25 ⁶ The court mentions the action against Diamond McCarthy,
26 while not specifically adverse to the interests of the Committee
27 or the estate, and not a factor in reaching the harsh result
28 against MLLP and Mr. McGrane, to illustrate just another of the
inexplicable and unnecessary actions that have added confusion and
expensive distractions to the administration of this complicated
bankruptcy estate.

1 motion by order dated May 22, 2014; MLLP filed a motion for leave
2 to appeal, which was docketed by the district court as a notice of
3 appeal on May 23, 2014 (Civil Case No. 14-02724 JD). Thereafter,
4 on June 13, 2014, MLLP commenced an adversary proceeding on behalf
5 of the Advanced Creditors against Diamond McCarthy for breach of
6 fiduciary duty and declaratory relief. He later requested the
7 district court to withdraw the reference (Civil Case No. 14-02881-
8 VC). On July 21, 2014, the district court entered an order
9 treating all three matters (Civil Case Nos. 14-3062, 14-2724, and
10 14-2881) as related. Ultimately, following several unfavorable
11 rulings, MLLP stipulated to dismissal of the actions.

12 III. DISCUSSION

13 A. Violations of the Rules of Professional Conduct

14 Attorneys appearing before this court are bound by B.L.R.
15 1001-2(a), which incorporates Civil L.R. 11-4(a). Civil L.R. 11-
16 4(a)(1) in turn requires all attorneys to be familiar with and
17 comply with the standards of professional conduct required of
18 members of the State Bar of California. California Rule of
19 Professional Conduct ("CRPC") 3-310 governs the representation of
20 conflicting interests. CRPC 3-310(E) prevents an attorney or the
21 attorney's firm from representing a client with interests that are
22 adverse to a former client from whom the attorney has obtained
23 confidential information unless the attorney obtains the written
24 consent of the former client.⁷ Allen v. Academic Games Leagues of

25 ⁷ Rule 3-303(E) states:

26 A member shall not, without the informed written consent
27 of the client or former client, accept employment
28 adverse to the client or former client where, by reason
of the representation of the client or former client,

1 America, Inc., 831 F. Supp. 785, 787 (C.D. Cal. 1993). The
2 California Supreme Court recently expounded on the ramifications
3 of CRPC 3-310(E): "[A]n attorney is forbidden to do either of two
4 things after severing (the) relationship with a former client.
5 (The attorney) may not do anything which will injuriously affect
6 (the) former client in any matter in which (the attorney) formerly
7 represented (the client) nor may (the attorney) at any time use
8 against (the) former client knowledge or information acquired by
9 virtue of the previous relationship." Oasis W. Realty, LLC v.
10 Goldman, 51 Cal.4th 811, 821, 250 P.3d 1115, 1121 (2011) (multiple
11 citations omitted).⁸

12 Actual use of confidential information is not required to
13 find that an attorney has violated CRPC 3-310(E); simple access to
14 that information is sufficient. Because courts should not inquire
15 into the specifics of communications between a client and its
16 former counsel to show that the attorney did or did not obtain
17 confidential information during the course of the former
18 representation, the court must instead adopt a substitute test to
19 determine whether an attorney has received confidential

20 _____
21 the member has obtained confidential information
22 material to the employment.

23 Cal. R. Prof. Conduct 3-310(E).

24 ⁸In Oasis, attorney Goldman represented Oasis in its effort
25 to obtain approval of a redevelopment project. About two years
26 after Goldman terminated the representation, he became involved in
27 a political campaign to thwart the redevelopment project. Oasis
28 sued Goldman for breach of fiduciary duty. Goldman filed an
anti-SLAPP motion to strike the complaint. "The trial court held
that the anti-SLAPP statute did not apply, in that the gravamen of
the causes of action was not Goldman's petitioning activity but
his breach of the duties of loyalty and confidentiality." Id. at
815.

1 information material to employment adverse to a client:

2 The substitute approach adopted by the courts is the
3 "substantial relationship" test. This test governs
4 disqualification motions under Rule 3-310(E). (Multiple
5 citations omitted). *Under the substantial relationship*
6 *test, the subject matter of an attorney's current*
7 *representation is considered substantially related to*
8 *the subject matter of the attorney's prior*
9 *representation if any information that was material to*
10 *the evaluation, prosecution, settlement, or*
11 *accomplishment of the prior representation is also*
12 *material to the evaluation, prosecution, settlement, or*
13 *accomplishment of the current representation. (Citation*
14 *omitted).*

9 In re Muscle Improvement, Inc., 437 B.R. 389, 395 (Bankr. C.D. Cal.
10 2010) (emphasis added). If the two matters are substantially
11 related, access to and possession of confidential information is
12 presumed, and "and disqualification of the attorney's
13 representation of the second client is mandatory." Id.
14 Consequently, there is no need to establish that the attorney
15 actually obtained confidential information to disqualify that
16 attorney under the rules of professional conduct. Allen, 831 F.
17 Supp. at 787. As noted by the California Supreme Court in its
18 discussion of CRPC 3-310(E):

19 Where the requisite substantial relationship between the
20 subjects of the prior and the current representations
21 can be demonstrated, access to confidential information
22 by the attorney in the course of the first
23 representation (relevant, by definition, to the second
24 representation) is presumed and disqualification of the
25 attorney's representation of the second client is
26 mandatory; indeed, the disqualification extends
27 vicariously to the entire firm.

25 Flatt v. Superior Court of Sonoma County, 9 Cal.4th 275, 885 P.2d
26 950, 36 Cal.Rptr.2d 537 (1994), citing Rosenfeld Construction Co.
27 v. Superior Court, 235 Cal.App.3d 566, 575, 286 Cal.Rptr. 609
28 (1991) ("If a substantial relationship is established, the

1 discussion should ordinarily end. The rights and interest of the
2 former client will prevail.").

3 In applying the "substantially related" test, the court must
4 examine whether "the factual contexts of the two representations
5 are similar or related." Employers Ins. of Wausau v. Albert D.
6 Seeno Const. Co., 692 F. Supp. 1150, 1162 (N.D. Cal. 1988),
7 quoting Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980).

8 In the present case, the factual contexts of the two
9 representations are without doubt similar and related. As counsel
10 for the Committee, Mr. McGrane investigated potential claims
11 against the former partners of Howrey; as counsel for Howrey
12 Claims, he could utilize the knowledge he acquired as Committee
13 counsel (such as specific factual details and legal theories) to
14 pursue claims against the former partners and others, even though
15 prosecution of such lawsuits on behalf of a limited group of class
16 members jeopardized the ability of the Committee and the Trustee
17 to pursue similar claims arising from the same nucleus of facts.
18 He could (and did) use information obtained as counsel to the
19 Committee to fight a significant settlement reached by the
20 Committee and Trustee, thereby impairing the ability of the
21 Committee and the Trustee to pursue consensual resolution of
22 lawsuits or potential lawsuits. And if he succeeded in
23 prosecuting those lawsuits, he would be depleting assets and
24 usurping claims that belong to the estate.⁹ As this court held,

25
26 ⁹In pursuing the class action claims, MLLP appeared to
27 actually disclose confidential information and research developed
28 by the Committee and Trustee (with whom the Committee had a joint
privilege agreement) during his tenure as co-counsel for the
Committee. MLLP's first fee application includes time entries
regarding investigations into potential chapter 5 and section 723

1 and the district court affirmed, Mr. McGrane violated the
2 automatic stay when he filed the Alter Ego AP. That, in and of
3 itself, was detrimental and adverse to the interests of his former
4 client.

5 More importantly, Mr. McGrane took a position directly
6 adverse to his former client when he opposed the KTBS Settlement
7 negotiated and supported by the Committee. Again, the substance
8 of the settlement pertained to matters substantially similar to
9 those he investigated while counsel for the Committee, and he is
10 thus presumed to have acquired confidential information in the
11 course of his former representation. MLLP thus violated its
12 ethical duties to its former client, the Committee, when it
13 represented the conflicting interests of the Advanced Creditors on
14 a matter which was substantially related to its prior
15 representation of the Committee.

16 Mr. McGrane argued that his fiduciary duties to the Committee
17 ended when he withdrew from representation of it. In other words,
18 he contends that post-withdrawal conduct is not pertinent to a

19
20 claims. Similarly, the time entries appended to MLLP's second fee
21 application reflect that Mr. McGrane was developing similar
22 theories that could be asserted directly against the former
23 partners of Howrey. After MLLP withdrew from representation of
24 the Committee, it filed the Alter Ego AP on November 9, 2012. In
25 a memorandum to potential class members dated November 17, 2012,
26 Mr. McGrane discussed several theories of recovery that been
27 investigated (and even rejected, as with the potential section 723
28 claims) during his tenure as counsel to the Committee. (The
letter is appended as Exhibit "E" to Mr. Englander's declaration
in support of the Committee's opposition to MLLP's fee
application, which was filed on July 8, 2014.) The closing
paragraph of that letter highlights the similarity of the claims
and attempts to justify a separate pursuit of those same claims,
stating that even if Trustee recovered 100% of all "multiple and
very large fraudulent transfers," the "creditors will still never
be made whole" given the costs of estate administration.

1 determination of his entitlement to compensation for services
2 rendered pre-withdrawal. He is mistaken. Withdrawal from
3 employment as a professional of the estate does not absolve him
4 from honoring his duty of loyalty to the former client, the
5 Committee:

6 An attorney is forbidden to do either of two things
7 after severing his relationship with a former client.
8 *He may not do anything which will injuriously affect his*
9 *former client in any manner in which he formerly*
10 *represented him, nor may he at any time use against his*
11 *former client knowledge or information acquired by*
12 *virtue of the previous relationship." . . .*

13 The relationship between attorney and client is a
14 fiduciary relation of the very highest character, and
15 binds the attorney to most conscientious fidelity --
16 *uberrima fides*. Among other things, the fiduciary
17 relationship requires that the attorney respect his or
18 her clients' confidences. It also means that the
19 attorney has a duty of loyalty to his or her clients.

20 In re Jaeger, 213 B.R. 578, 587 (Bankr. C.D. Cal. 1997) (emphasis
21 added), quoting Deukmejian v. Brown, 29 Cal.3d 150, 172 Cal.Rptr.
22 478, 480, 624 P.2d 1206 (1981) and Zador Corp. v. Kwan, 31
23 Cal.App.4th 1285, 37 Cal.Rptr.2d 754, 758 (1995).

24 "It is the general rule in conflict of interest cases that
25 where an attorney violates his or her ethical duties to the
26 client, the attorney is not entitled to a fee for his or her
27 services." Cal Pak Delivery, Inc. v. United Parcel Service, Inc.,
28 52 Cal.App.4th 1, 60 Cal.Rptr.2d 207, 215 (1997).

Even though Mr. McGrane's conduct that violates CRPC 3-310(E)
necessarily occurred after he withdrew from representation, the
court may deny or reduce fees incurred prior to withdrawal. In
addition, a bankruptcy court may deny compensation to an estate
professional "on account of such attorney's wrongdoing,

1 negligence, or serious breaches of fiduciary obligations." In re
2 Wilde Horse Enterprises, Inc., 136 B.R. 830, 844 (Bankr. C.D. Cal.
3 1991). Here, MLLP owes ongoing ethical responsibilities to the
4 Committee and its constituency. It violated those ethical duties
5 when it attempted to usurp claims belonging to the estate,
6 disclosed confidential Committee negotiations and strategy in
7 public filings, and vigorously opposed a settlement reached and
8 supported by the Committee.

9 A chapter 11 liquidation is an ongoing judicially-supervised
10 process. Court-appointed professionals have "a high fiduciary
11 duty to the estate" and "must abide by the highest professional
12 standards." Wilde Horse, 136 B.R. at 840. Permitting former
13 counsel for the Committee to espouse a position that jeopardizes
14 the interests of the Committee for the benefit of another client
15 compromises the judicial process. "Improper conduct on the part of
16 officers or attorneys has frequently been penalized by withholding
17 compensation or reimbursement or both." Id., quoting Matter of
18 Ranchero Motor Inn, Inc., 527 F.2d 1044 (9th Cir. 1975).

19 [T]he Court has the flexibility to tailor the relief
20 necessary to remedy an attorney's misconduct.
21 [Citations omitted]. *Violations of the Code or*
22 *professional ethics or breaches of fiduciary duties can*
23 *give rise to the reduction, denial, or other forfeiture*
24 *of compensation or other sanctions.* [Citations
25 omitted]. Ethical violations are relevant to fee
26 determinations for lawyers representing a Chapter 11
27 debtor in possession. [Citation omitted].

28 Wilde Horse, 136 B.R. at 844 (emphasis added). "Unethical conduct
by a fiduciary in a bankruptcy case damages the public's
confidence in judicially supervised reorganizations, whether or
not there is actual damage to the estate. Denial of compensation
is an appropriate deterrent to such conduct." In re Rivers, 167

1 B.R. 288, 302 (Bankr. N.D. Ga. 1994).

2 In light of the foregoing, with no reluctance, but with great
3 regret that such a result is necessary because of the conduct of
4 such a seasoned and experienced professional as Mr. McGrane is,
5 the court will allow MLLP on a final basis only \$32,355 of its
6 requested fees and \$877.05 in costs. That amount is the court's
7 best guess at the value of MLLP's work unrelated to the matters
8 that it handled for the Committee that were substantially related
9 to the matters on which it later acted adverse to the Committee
10 and the estate on behalf of Advance Creditors. To the extent that
11 MLLP has previously received payment in excess of these allowed
12 fees and costs sums, the excess payment, \$30,693.59 (\$63,925.64 -
13 \$33,232.05), shall be disgorged within 30 days of entry of an
14 order consistent with this memorandum decision.

15 B. Disqualification of MLLP and Mr. McGrane

16 Since the hearing on the Committee's renewed motion to
17 disqualify MLLP and Mr. McGrane on July 30, 2014, Mr. McGrane has
18 withdrawn from all adversary proceedings, contested matters and
19 related appeals. See correspondence at Docket Nos. 1985, 1986,
20 and 1988, a letter dated September 16 from Mr. McGrane's counsel
21 representing that Mr. McGrane and MLLP "have no intention of ever
22 again appearing in this Howrey bankruptcy case." As long as Mr.
23 McGrane and MLLP abide by this representation to the court, and do
24 not appear in the present Howrey bankruptcy case, any adversary
25 proceeding or contested matter in the case, or in any action in
26 another forum against Howrey or its former members, the motion to
27 disqualify will be considered moot. The motion to disqualify may
28 nevertheless be revived if MLLP or Mr. McGrane again violate any

1 ethical duty to their former client, the Committee.

2 IV. DISPOSITION

3 MLLP has violated relevant rules governing professional
4 conduct and has breached the fiduciary duty to its former client,
5 the Committee. This court will therefore deny fees in the amount
6 of \$46,325, will finally allow fees in the amount of \$32,355 and
7 costs in the amount of \$877.05, and will require MLLP to disgorge
8 \$30,693.59. The court is concurrently issuing an order consistent
9 with this memorandum decision.

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11 **END OF MEMORANDUM DECISION**
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